

GUIDE TO CASE MANAGEMENT AND BUDGETING IN CAPITAL HABEAS CASES EASTERN DISTRICT OF CALIFORNIA FRESNO DIVISION

INTRODUCTION

1. This guide provides an overview of the case management and budgeting process for capital habeas corpus cases in the Fresno Division of the Eastern District of California. Updates of this guide are available on the Court's website at www.caed.uscourts.gov, under Fresno, Attorney Info, Forms, Case Management and Budgeting in Capital Cases. The information contained within this guide is of primary interest to attorneys appointed to represent capital habeas petitioners, but also is relevant to Deputy Attorneys General assigned to cases pending in the Fresno Division. The case management and budgeting process is intended to ensure continuing court supervision of capital habeas cases and to control costs by:
 - Dividing cases into four logical phases for which budgets can be developed;
 - Requiring Petitioner's counsel to submit to the Court a case management plan and budget for each phase of the case;
 - Using an automated budgeting program;
 - Conducting case management conferences to manage the proceedings and resolve budget issues; and
 - Establishing deadlines governing completion of the activities contemplated for each phase.
2. The process described in this guide applies to the first federal capital habeas corpus petition filed in a case. The process requires continuous judicial case management to conserve judicial resources by creating realistic expectations on the part of counsel, and by reducing time spent

on contentious procedural issues. The judge assigned to an individual case may modify the process described herein.

3. The automated “Case Management Plan and Budget Forms” created by the Judicial Council of the Ninth Circuit are to be used by counsel for capital habeas petitioners appointed pursuant to the Criminal Justice Act (“CJA”) in preparing for each phase of the case. The phases are:

Phase I Appointment, Record Review, and Preliminary Investigation

Phase II Petition Preparation, Answer, and Exhaustion

Phase III Merits Briefing, Fact Development Discovery, and Motion for Evidentiary
Hearing

Phase IV Pre-Evidentiary Hearing Discovery, Evidentiary Hearing, and Final Briefing

4. Automated forms require Microsoft Excel software. The automated forms provide activity categories designed to assist counsel in planning their work, developing a budget, keeping track of expended and remaining hours, and completing the CJA vouchers.
5. For assistance with the substantive law governing federal habeas corpus proceedings, counsel may refer to the Ninth Circuit Capital Punishment Handbook. The Handbook is located under “Publications” on the website for the Ninth Circuit’s Office of the Circuit Executive at www.ce9.uscourts.gov. Counsel also may consult with the California Habeas Corpus Resource Center and the Capital Habeas Unit of the Federal Defender for the Eastern District of California. Both agencies maintain brief banks and assist attorneys assigned to capital habeas cases. A substantial amount of consultation, however, will be considered work inherently necessary to practice and remain current in the area of federal habeas law, which is considered part of overhead and not reimbursable. This follows from the Court’s perspective that any work counsel may undertake to remain current in the area of federal habeas law, including review and analysis of recently decided cases, is non-reimbursable overhead.

COMMENCEMENT OF THE CASE

6. The federal capital habeas corpus process typically is initiated by Petitioner's requests for stay of execution, for leave to proceed *in forma pauperis*, and for appointment of counsel. Upon filing, the case is assigned to a district judge.
7. Following review of the initial pleadings, the Court will issue an order staying execution if necessary, evaluating Petitioner's request to proceed *in forma pauperis*, and addressing the appointment of counsel. The stay of execution issued pending appointment of counsel is authorized pursuant to Rule 81-191(h)(2) of the Local Rules for the Eastern District of California. A stay of execution issued following appointment of counsel is governed by 28 U.S.C. § 2251(a)(3) and Local Rule 81-191(h)(3). To the extent the provisions are inconsistent, the United States Code prevails. Under § 2251(a)(3), the stay shall terminate no later than 90 days after counsel is appointed. Generally, the case will be referred to the Selection Board of the Eastern District of California for recommendation of counsel.
8. While the Court often appoints two attorneys to a case due to the complex nature and restrictive time limits of capital habeas work, appointment of two attorneys at the maximum hourly rate is not presumed and requires a showing of good cause. 18 U.S.C. § 3599(d). Justification for the appointment of two lawyers who truly function as co-counsel to one another will be required. According to the amended costs policy promulgated by the Ninth Circuit Judicial Council, the maximum rate of compensation for lead counsel, who have substantial experience and skill in federal capital habeas corpus proceedings, is \$166 per hour. The compensation rate for attorneys with significant, but less than substantial experience is \$151 per hour. All other lead counsel will be compensated at a rate between \$131 and \$146 per hour according to their experience and skill. Second counsel will be compensated at a rate between \$106 and \$131 per hour based on experience and skill. Appointed counsel shall

specify whether they are co-counsel or lead and second counsel and are directed to complete the Rate Justification Worksheet (Appendix A) for determination of the appropriate compensation rate.

9. The Court may issue an order scheduling a Case Management Conference (“CMC”) shortly after the appointment of counsel.

BUDGET PROCEDURES

10. Budgeting forms for each of the four phases may be viewed and downloaded from the Court’s website at www.caed.uscourts.gov, under Fresno, Attorney Info, Forms, CJA. The Ninth Circuit Judicial Council’s Amended CJA Capital Habeas Costs Policy (“Ninth Circuit Capital Habeas Costs Policy”) also is available at the same location on the Court’s website.
11. Automated procedures and instructions are as follows:
 - a. The automated budget and voucher processing file for the current phase will be sent to counsel by the Ninth Circuit Executive’s Office.¹
 - b. Counsel shall complete the proposed budget for the current phase of the litigation and print out a hard copy. Counsel will be directed to e-mail the completed budget to the Court and/or to the Ninth Circuit Executive’s Office. The hard copy together with the entire application shall be filed under seal with the Court, as indicated below.

Although the Eastern District now utilizes electronic filing, documents to be filed under seal must still be physically submitted to the Clerk’s Office of the Court, at which time they are manually scanned into the electronic filing system. After the budget is approved, the updated file will be e-mailed back to counsel for voucher processing.

¹ Prior to this, counsel may view and download the forms from the Court’s website.

- c. Counsel shall fill in the timesheet portion of the automated file as work is performed, and the expense sheet portion as expenses are incurred or bills are received.
 - d. At the end of the month, counsel will complete the voucher by electronically signing it and dating it. The electronic copy of the voucher shall be sent via e-mail to the Court. All attached receipts or invoices should be scanned and e-mailed with the voucher and time sheets.
 - e. Bills from any investigative, expert or paralegal service shall be sent to the CJA Administrator with all supporting documentation. The CJA Administrator manually will prepare a CJA Form 31 voucher and return it for the service provider's and counsel's signatures. After processing the signed voucher for payment, the approved amounts for investigative, expert or paralegal services will be inputted into the automated file.
 - f. Following each voucher approval, the updated automated file will be e-mailed back to counsel so the process can be repeated for the ensuing months.
12. Under 18 U.S.C. § 3599(f), ex parte consideration of funding applications requires Petitioner to make a showing of the need for confidentiality. Since budget applications require disclosure of matters protected by the attorney-client or work-product privileges, the need for confidentiality is inherent in the budgeting process. *See* Fed. R. Civ. P. 26(b)(3). Accordingly, budget forms and supporting documentation will be filed under seal and not served on counsel for Respondent. Any ex parte court proceeding regarding funding will be reported and maintained under seal.
13. The budget should reflect the total attorney time required, including time for budget preparation, as well as the time for paralegals, investigators and experts, if applicable, and any anticipated travel or other expenses. Voucher preparation, however, is considered part of

overhead and not reimbursable. The tasks outlined in the automated budget forms are listed as a guide for counsel and are not intended to dictate what areas of investigation ought to be explored. Some tasks may not apply to a particular phase and other unlisted tasks may be appropriate. Counsel should complete the forms as appropriate to the case.

14. In support of the proposed budget for each phase, counsel shall file informative declaration(s) which explain and/or justify the hours, tasks and expenses in each category of the proposed budget and include any information that will assist the Court in determining the reasonableness of the budget request. The supporting documentation should be captioned and filed under seal in a complete application, including explanatory remarks, declarations, exhibits, and the completed budget form. All supporting declarations must be properly subscribed pursuant to 28 U.S.C. § 1746. Excluding Phase I, budget applications should be filed at least one week before the date set for the CMC, unless the Court sets an alternate date.
15. Counsel are expected to utilize all reasonable means to minimize costs, to tier staff responsibilities to lower-rate personnel whenever practical, and to utilize paralegals and law clerks to complete tasks for which attorney expertise is not required.
16. Requests for investigative and/or expert assistance should be detailed and present the factual basis to support the request. Prior to approval, the Court must find that the requested expert or investigative assistance is “reasonably necessary for the representation of the defendant.” 18 U.S.C. § 3599(f). Information which should be included in the supporting declaration to assist the Court includes, but is not limited to, a specification of: (1) the evidence sought to be uncovered; (2) facts suggesting that such investigation, expert service, or other assistance is warranted ; (3) whether the evidence existed at the time of the state trial; (4) the purpose of the evidence on federal habeas, that is, the connection of the evidence sought to be uncovered to a prospective claim or contention that will be raised in the federal petition; and (5) the

proposed billing rate and the reasonableness of the rate. Presumptive rates contained in the Ninth Circuit Capital Costs Policy will apply to all experts and investigators.

17. Counsel should provide the Court with the curriculum vitae of any expert and/or investigator that counsel proposes be retained. Hiring service providers who work in the geographic area where the work is to be performed should be considered to determine if the cost savings outweigh the factors favoring a single provider. For instance, if the task is interviewing members of Petitioner's family regarding mitigating evidence, an investigator who works in the city or region in which the majority of Petitioner's family resides might be retained. Any investigators retained to interview witnesses should avoid unnecessary expense by conducting interviews by telephone, if possible, and otherwise taking all reasonable steps to locate the interviewees before initiating any travel.
18. If the assistance of mental health experts is sought, counsel must disclose in the supporting declaration the services performed by, and summarize the findings of, previous mental health experts utilized in any capacity in the case, whether at the state or federal level. If the assistance of more than one mental health professional is proposed, counsel should make clear the tasks each expert is to complete, and how his or her work is distinguishable from that of prior and/or concurrent requested experts.
19. The Court appreciates that unanticipated events may require adjustments to an approved budget. Accordingly, the Court in some instances may grant conditional approval for certain tasks. Adjustment will be made during the voucher processing, as appropriate.
20. Counsel generally will not be allowed to exceed the authorized budget during any phase without first seeking prior approval, or amendment to the budget, and explaining why additional funds are required. Failing to obtain approval to amend the budget could result in the denial of unauthorized or excessive expenditures. Accordingly, counsel should request

permission to file any substantive pleading not anticipated in the budget, and should submit any request for amendment far enough in advance to provide the Court an adequate opportunity to consider and rule on the request without impeding the progress of the litigation.

21. The budget for each phase will be closed out when the work for that phase is completed. Hours and expenditures will not be carried over to the next phase. Rather, a new budget for each succeeding phase must be prepared by counsel and approved by the Court. As the case progresses through each case management phase, counsel are responsible for ensuring that the case is litigated within the established budget.

APPROVED COMPENSATION

22. Work inherently necessary to practice and remain current in the area of federal habeas law, which is not directly attributable to a particular case, including the review and analysis of new cases, is considered general overhead, and is not reimbursable.
23. The Court will not approve compensation for administrative, clerical, secretarial, or word processing/data entry services, regardless of whether the person performing the function is an attorney, law clerk, paralegal or secretary, and regardless of whether that person is regularly or specially employed, performing normal, overtime, or supplemental work, or even if counsel has no regularly employed secretary. Administrative services include preparation of payment vouchers and communications with Court staff concerning the scheduling of hearings, budgeting procedures and document due dates.
24. Compensation for conferences among appointed attorneys is limited if the conference (whether in person or by telephone) does not also involve work performed on another tangible task, such as drafting or editing a legal document. The Court will authorize payment for the proportion of the *total* amount of time appointed attorneys are engaged in a conference equal to the number of appointed attorneys (including associates) who participate. General entries

describing a meeting of the petitioner's litigation team are not acceptable. If there are two attorneys engaged in such a conference, the maximum ratio either one may bill is one-half of the total conference time. If three attorneys are engaged in a conference, each may bill only one-third of the total time, and so on.

25. Unless a contrary need is demonstrated, the Court will compensate only one attorney for physical attendance at CMCs and other court hearings. Similarly, the Court will compensate only one member of counsel's legal staff at a time for visits to Petitioner and witness interviews.
26. The Court will not approve compensation for work performed on appellate proceedings (whether from interlocutory orders or final judgments). Counsel are to seek compensation for work performed at the appellate level from the Court of Appeals after having obtained an appointment from that court.
27. The Court will compensate counsel for professional time spent in airport (or other common carrier) terminals and as a passenger on common carriers only when counsel is performing substantive tasks on the case that can be billed to a professional time category. Driving time will be compensated at the maximum rate of \$100 per hour. Although counsel may be compensated for legal work at a rate commensurate with his or her substantial experience and skill in federal capital habeas corpus proceedings, legal acumen is not being utilized for driving a car or waiting to board an airplane. The Court recognizes that when counsel is required to travel for a case and accept the lower reimbursement rate or no reimbursement, s/he could be working on another case at the maximum rate. In light of the public service

nature of CJA appointments together with the fact that public rather than private funds are being utilized, the modified travel reimbursement arrangement will be followed.²

APPROVED EXPENSES

28. The Court will authorize payment for miscellaneous expenses reasonably incurred and subject to national and district policies and procedures. Copies of all bills and receipts must be submitted for reimbursement approval.
29. Mileage for case-related travel by privately owned (not rented) automobile may be claimed at a rate in effect for federal judicial employees, available from the CJA Administrator. Case-related parking fees and bridge/road tolls also are reimbursable. Counsel should assess whether case-related travel would be more cost effective by privately owned automobile or rented automobile.
30. Ground transportation other than by privately owned automobile will be reimbursed on an actual expense basis. Counsel should make every effort to obtain the lowest possible fares or rates.
31. Though travel expenses may be authorized in the budget, each time a member of Petitioner's litigation team intends to travel by air, a Travel Request and Authorization Form must be authorized by the CJA Administrator and approved by the Court, unless counsel can procure more economical travel arrangements on his or her own. Approval of a travel authorization

² Though civil attorneys receive full compensation for litigation-related travel, parity does not exist in the context of CJA expenditures. Courts consistently have determined that a "fair" fee under the CJA does not mean the compensation must be "full." *United States v. Johnson*, 214 F.Supp. 2d 488, 491 (E.D. Penn. 2002). This follows because "a substantial element of appointed counsel's representation under the act [CJA] remains public service." *United States v. Carnevale*, 624 F.Supp. 381, 384 (D.R.I. 1985). CJA compensation has never been intended to mirror private sector rates. *United States v. Diaz*, 802 F.Supp. 304, 307 (D.C. Cal. 1992).

form is the procedure by which government rates for travel are obtained; the form does not function as approval of travel expenses in excess of the budget. Should the authorized budget be insufficient for the anticipated costs of travel, counsel must seek modification of the budget in addition to obtaining a travel authorization form from the CJA Administrator.

32. The Travel Request and Authorization Form enables CJA counsel to receive air travel at government rates paid directly from CJA funds. Counsel are expected to request authorization for air travel through the CJA Administrator in sufficient time in order to obtain low cost advance fare for air travel or to provide justification why an advance fare could not be obtained. In no case will counsel be reimbursed for first-class travel expenses. Counsel may make their own reservations for air travel and seek reimbursement on a CJA voucher, but reimbursement will be limited to the available government rates.
33. The Court will approve reimbursement for food and lodging expenses at the established area per diem rate for out of town travel on case-related business. Current travel and subsistence allowances are available on the GSA website, www.gsa.gov, under Per Diem rates, or from the CJA Administrator.
34. Counsel will be reimbursed for the actual cost of case-related long-distance telephone calls. The Court will not authorize payment for any surcharges or for general telephone service. Facsimile transmissions are reimbursable for the actual amount of the telephone charge.
35. Counsel will be reimbursed for the actual out-of-pocket expenses incurred in photocopying, up to a maximum of 10 cents per page. Counsel will be expected to send documents over 100 pages in length to an outside copying service, unless counsel's in-house photocopying is more economically efficient.
36. The Court will authorize reimbursement for the actual cost of case-related regular U.S. postage. The Court will approve reimbursement for the actual cost of other postal services or

the use of non-federal carriers (such as overnight or two-day deliver) only if circumstances require the use of such services. If counsel utilize expedited delivery services, a statement detailing the necessity of such delivery must be submitted with the itemized bill. Counsel are to make every effort to use regular U.S. mail and e-mail via the Internet whenever possible. The Court may modify this rule if counsel make excessive use of costly overnight carriers.

37. The Court will authorize reimbursement for the cost of computer-assisted legal research which exceeds counsel's flat-fee research plan, provided the time expended is reasonable for the task(s) undertaken and a full explanation is provided. *See Ninth Circuit Capital Habeas Costs Policy* for further explanation.
38. The Court will not reimburse counsel for the following expenditures:
 - a. General office overhead; including cellular telephone maintenance fees;
 - b. Books or other publications;
 - c. General law office supplies;
 - d. Travel, attendance, registration, or material costs related to educational seminars.

VOUCHER PROCEDURES

39. All vouchers are reviewed for reasonableness.
40. Counsel are directed to submit vouchers covering services from the commencement to the completion of each budgeted phase, on a monthly basis. Generally, vouchers should extend from the first to the last day of each month, except when combined attorney's fees and expenses total less than \$1,000 for any given month. In that event, the fees and expenses for that month may be combined with the fees and expenses incurred the following month. If a budgeted phase commences mid-month, the voucher may extend to the end of the following month. Similarly, if the budgeted phase is completed mid-month, the voucher will extend to that date. All vouchers are to be submitted within the first ten days of the month following the

last day of service reported. All fees and expenses for a particular time period should be submitted on the same voucher to the extent possible (e.g., travel and administrative expenses).

41. The Court expects counsel to submit vouchers within 90-days of the services provided, absent prior arrangements made with the Court for a later submission. No vouchers will be processed for services rendered more than one-year from the date of submission of the voucher.
42. Billing statements or voucher worksheets shall specifically describe the work performed, the time allotted to each specific task, reported to one-tenth (.1) of an hour. Descriptions should not be vague or general. Each time entry shall reflect discrete, individual tasks and shall not simply list multiple tasks performed in a specified block of time. Information should be provided in sufficient detail so as to permit meaningful review, including: identification of individual witnesses interviewed; identification, by name or title, of persons involved in telephone conversations or conferences; specific topics researched; and identification of pleadings drafted or reviewed. Aggregate time blocks or entries which are vague or ambiguous will not be approved for payment. If the level of detail is insufficient for auditing purposes, the vouchers will be returned to counsel for resubmission with adequate detail.
43. Funds are approved only to the extent that the tasks outlined in the budget ultimately are required. Reimbursement may be reduced if specified tasks are less complex than anticipated.
44. Should the need arise, informal written request may be made to transfer attorney hours and expenses from one task to another, and/or between appointed counsel. If appropriate, the Court will approve such transfers. Budgeted amounts may not be transferred between or among experts and investigators.
45. In the event that in-court transcripts of non-evidentiary hearings are requested by Petitioner, Petitioner's counsel should arrange with the court reporter(s) to bill the Court directly through

the use of a CJA Form 24. Counsel shall not include the cost of transcripts as an out-of-pocket expense on a CJA Form 30.

46. Services provided by law clerks may be listed as an expense on counsel's CJA Form 30.

CASE MANAGEMENT PHASES

Phase I – Appointment, Record Review, and Preliminary Investigation

47. Phase I encompasses case proceedings from the appointment of CJA counsel through review and annotation of all available records, and includes, if necessary, preliminary investigation of Petitioner's competence to proceed with federal litigation. Prior to the first CMC, Petitioner's counsel should prepare an estimate of the time needed for record assembly. Counsel for both parties shall complete, to the extent possible, the Case Evaluation Form, (*see* Appendix B), and file it under seal one week prior to the CMC at which Phase I budgeting issues will be addressed. To assist in continuing evaluation of case complexity, the Court may request updates as more information becomes available.
48. The first Phase I CMC, at which counsel for Petitioner and Respondent both are present provides an opportunity to make a preliminary evaluation of case complexity, discuss a potential timetable based upon when the petition must be filed within the statute of limitations, determine how much time will be needed to assemble the case record, and set a date for Respondent to lodge the state record. The Court may require counsel for Respondent to provide any missing portions of the state record to Petitioner's counsel. The Court also may issue a subpoena duces tecum requiring prior counsel to supply case files to Petitioner's counsel. Counsel should notify the Court of any delays in receiving prior counsel's files.
49. Once case management issues are resolved, counsel for Respondent will be excused from the CMC so the Court can discuss budgeting procedures with Petitioner's counsel on an ex parte basis. Among the topics to be discussed during the ex parte proceedings is the time

Petitioner's counsel believe they will need to complete their review and annotation of the record. The Court additionally may authorize interim expenditures for paralegals at an approved rate and schedule a date for submission of the proposed budget for Phase I (if it has not been submitted previously). The proposed budget should include all tasks to be completed during Phase I, including the time actually spent on tasks which already have been completed or partially performed. Counsel will not be reimbursed for work prior to the date of appointment without court approval. The services of investigators or experts are not contemplated during this phase, but will be considered upon adequate justification.

50. After each CMC, the Court will, if necessary, issue two case management orders, one filed publicly, addressed to all parties, setting forth significant dates and establishing schedules, and one filed under seal, addressed only to Petitioner's counsel, regarding budgeting issues. The publicly filed order for Phase I will include, if the parties and the Court agree, the date upon which the statute of limitations expires, a due date for Respondent to lodge the state record with the Court, the date of the next CMC, if any, and the date for the culmination of Phase I, as well as any other matters or decisions made at the conference.
51. If a Phase I budget has already been submitted, an explanation of the approved budget may be included in the sealed order, including allowable billing rates and the due date for filing the Phase II Case Management and Budget Form. If the Phase I budget is not already on file, the sealed order will record the deadlines set for the filing of the budget for Phase I, and memorialize any discussions entertained during the confidential portion of the CMC. Once the budget is submitted the Court will issue a subsequent order under explaining approval of the plan and establishing a due date for filing the proposed Phase II budget.

Phase II - Preparation of the Petition, Answer, and Exhaustion

52. By the time the Phase II CMC is conducted, Petitioner's proposed budget and budget application should be on file with the Court. Counsel for both parties should be present at the Phase II CMC to discuss the litigation timetable and set deadlines for filing the petition and answer. The petition should include factual allegations and the legal basis or theory underlying the claims, but not points and authorities, and must be filed within the time limits required by the statute of limitations.³ Considering this limitation, the Court will discuss with counsel for both parties how much time will be required to prepare the petition and answer. The Court also will discuss with the parties the need to resolve any potential dispute as to the exhaustion status of the petition immediately after the answer is filed. This will be accomplished by directing the parties to meet and confer and then to file a joint statement setting forth the claims upon which they agree and disagree are exhausted. The joint statement should be filed within 30 days following the filing of the answer.
53. At the conclusion of this discussion, counsel for Respondent will be excused, and an ex parte budgeting conference will commence. Counsel for Petitioner should be prepared to discuss the justification for the proposed Phase II budget, and to state what investigation will be needed in connection with each issue.
54. The results of this CMC will be entered into two case management orders. The order publicly filed will contain the due dates for filing the petition, the answer, and the joint statement

³ A federal habeas petition does not toll the statute of limitations for any unexhausted claims. *Duncan v. Walker*, 533 U.S. 167, 181 (2001). Any unexhausted claims should be filed with the state court as soon as they are discovered in order to toll the statute of limitations pursuant to 28 U.S.C. § 2244(d)(2). However, *Bonner v. Carey*, 425 F.3d 1145, 1149 (9th Cir.2005), *amended* 439 F.3d 993 (9th 2006) has held that state habeas petitions subject to the California procedural bar for untimeliness do not satisfy the statutory tolling requirements of § 2244(d)(2). *See Pace v. DeGuglielmo*, 544 U.S. 408 (2005).

regarding exhaustion, the date for the next CMC, if any, and any other decision made at the conference. The order under seal will discuss the approved Phase II budget.

55. Once Petitioner files a petition, Respondent shall file an answer, without points and authorities, consistent with Rule 5 of the Rules governing § 2254 Cases (as amended and effective 12/1/04) (hereafter the "§ 2254 Rules").⁴ The answer shall raise all substantive and procedural affirmative defenses Respondent intends to pursue.
56. As noted above, within 30 days from the filing of the answer, the parties will have conferred and filed a joint statement setting forth their respective positions regarding the exhaustion status of the petition. If the parties agree in the joint statement that the petition is fully exhausted, the Court will set a date for the Phase III CMC. If the parties agree that certain claims in the petition are not exhausted, the Court will consider the necessity of abeyance as specified in ¶¶ 57-59, *infra*.
57. If the joint statement does not resolve issues of exhaustion, further proceedings may be required to settle the dispute. Ultimately, if the Court determines that any claims in the petition are unexhausted, the case may be directed back to state court for exhaustion during which time the federal proceedings will likely be held in abeyance.⁵

⁴ In rare cases, where a petition presents an obvious or other facial defect, the Court may be persuaded to permit Respondent to file a responsive pleading in the form of a motion to dismiss consistent with Rule 4 of the § 2254 Rules. Respondent is advised that the issue of procedural default will not be considered at this juncture.

⁵ The Court may determine abeyance is appropriate without the necessity of petitioner filing a motion. *See Rhines v. Weber*, 544 U.S. 269, 276 (2005) (holding a district court retains discretion to stay federal proceedings pending the resolution of state habeas proceedings). The petitioner need not amend the mixed petition to delete unexhausted claims before abeyance is ordered, so long as the petitioner has satisfied the requirements established in *Rhines* for holding a mixed petition in abeyance pending state exhaustion. The Respondent will be permitted to contest the Court's intention to hold a federal case in abeyance pending state exhaustion.

58. If the federal proceedings are held in abeyance, Petitioner's counsel will be directed to file brief status reports on the progress of the case in state court on a quarterly basis. Counsel will be paid for the small amount of time this task requires. Unless otherwise directed, the Court expects that no other fees or expenses will be incurred while a case is held in abeyance. Counsel are to seek funds from the state court for fees and expenses incurred during this period.
59. Upon return to federal court after exhaustion, the Court may schedule another CMC for purposes of establishing due dates for filing the answer⁶ and the Phase III budget as well as scheduling the Phase III CMC.

Phase III: Merits Briefing, Fact Development Discovery, and Request for Evidentiary Hearing

60. At the Phase III CMC, the Court will address briefing of the claims in the petition and preparing a motion for further factual development (i.e., discovery,⁷ evidentiary hearing and record expansion). Briefing entails Petitioner's preparation of a comprehensive memorandum of points and authorities in support of the claims alleged in the petition, Respondent's preparation of a comprehensive memorandum of points and authorities opposing the claims in the petition, including the development of any alleged affirmative defenses, and Petitioner's

⁶ Since the *Rhines* procedure does not require deletion of unexhausted claims, or amendment of the existing federal petition, it can be anticipated that the next pleading to be filed is the answer. In some situations, however, the Court recognizes that a petitioner will want to amend the existing federal petition to allege new claims, recently exhausted, once state proceedings are complete. Petitioners are admonished that under *Mayle v. Felix*, 545 U.S. 644, 662-64 (2005), newly alleged claims in an amended petition may be barred by the statute of limitations if they do not relate back within the narrow definition of that case. Hours requested by Petitioner's counsel to amend the federal petition will be closely scrutinized, as amending the petition should be straightforward, usually only involving the incorporation of new claims filed in the state petition.

⁷ Discovery conducted during Phase III is designed to develop facts, and is distinguished from discovery conducted during Phase IV in anticipation of an evidentiary hearing.

preparation of a reply responding to arguments advanced by Respondent in the opposition brief. If deemed appropriate and in the Petitioner's interest, Petitioner's counsel is encouraged to discuss at the CMC any discovery identified in the previously submitted proposed budget and budget application. Since a significant number of discovery issues can be resolved informally by the parties, a significant portion of discovery identified in the proposed budget and budget application ultimately may require far less time to complete than originally contemplated. As mentioned above, the Court's approval of a budget item may be conditional on the complexity of the task and downward adjustment may be made during voucher processing, as necessary. *See* ¶ 19, *supra*.

61. When preparing a request for evidentiary hearing, Petitioner's counsel should be mindful that the request shall not recite any legal authority on the merits of the claims, but be limited to identification of: (a) the claims for which a hearing is sought; (b) an offer of proof as to the evidence sought to be presented; and (c) the legal grounds for the evidentiary hearing, including reason(s) Petitioner did not present the evidence in state proceedings. *See* 28 U.S.C. § 2254(e)(2). The budget for Petitioner's evidentiary hearing motion should include preparation of a reply brief.
62. If during the litigation of Phase III, the parties wish to involve the Court in resolution of any case management disputes or if a modification of the case management plan appears necessary, further CMCs may be requested.
63. Phase III of the litigation is complete when the Court issues an order addressing Petitioner's request for an evidentiary hearing. Contemporaneous with the issuance of an order granting

evidentiary hearing, the Court will schedule the next CMC and direct Petitioner's counsel to file a budget application for Phase IV.⁸

Phase IV: Pre-hearing Discovery, Evidentiary Hearing and Final Briefing

64. In the event an evidentiary hearing is granted, Phase IV may be bifurcated into two parts and multiple CMCs may be necessary to determine the time and resources needed to prepare for and conduct pre-evidentiary hearing discovery and an evidentiary hearing, as well as post-evidentiary hearing briefing. These CMCs provide an opportunity for the Court to fully explore remaining areas of dispute, ascertain any items of agreement, and encourage the possibility of case resolution.
65. Should case resolution fail to materialize, the Court will address pre-evidentiary hearing discovery. Pre-hearing discovery may be considered on the papers, and may include deposing the opponent's experts, obtaining documents upon which expert testimony is predicated, and identifying witnesses who will provide live or declaration testimony. The Court will determine how evidence will be received and may allow some direct testimony by declaration or depositions in lieu of live testimony (subject to live cross examination). In order to make the budget process meaningful, the parties will have to disclose the identities of key witnesses who are expected to be deposed and/or provide live testimony. Only in this way will Petitioner's counsel be able to estimate the number of witnesses to be deposed on behalf of Petitioner and the number of witnesses Respondent will depose at which attendance of Petitioner's counsel will be required. In preparing the proposed budget and budget application for Phase IV, Petitioner's counsel should include a listing of witnesses from whom testimony

⁸ The Phase IV budget application will be very minimal if the Court denies Petitioner's evidentiary hearing motion, as only a notice of appeal need be filed. Only rarely will the Court request briefing on a COA, and even more rarely will the Court be persuaded to permit Petitioner to file a motion for reconsideration.

is expected to be elicited. The matter of how testimony will be presented can be discussed at the CMC with Petitioner's counsel, Respondent's counsel, and the Court.

66. Certain expenses incurred in connection with depositions of fact witnesses are paid by the U.S. Marshal for the Eastern District of California, and as such are not part of the budget. First, the Marshal pays expenses associated with fact witnesses deposed by Petitioner (whether or not by subpoena), including witness fees and travel expenses, the court reporter's fees, and cost of the original transcript. Second, for depositions of fact witnesses conducted by Respondent, the Marshal pays costs associated with Petitioner's copy of the deposition transcript. *See* 18 U.S.C. § 1825(b); Guide to Judiciary Policies and Procedures, Volume VII, § 3.13(B). Under Rule 6(c) of the § 2254 Rules, for fact witness depositions noticed by Respondent, the Court may additionally require the State of California to pay travel expenses, subsistence expenses, and fees of Petitioner's attorney (which the Court will limit to one of Petitioner's attorneys) to attend the deposition. Witness fees, travel expenses, reporter's fees, and cost of original transcripts for fact witness depositions noticed by Respondent must be paid by the State of California. The State of California also pays for Respondent's transcript copy of a fact witness deposition noticed by Petitioner.
67. Depositions of expert witnesses generally are the responsibility of the party noticing the deposition. Under F.R.C.P. 26(b)(4)(c), the party seeking discovery concerning the opponent's expert witness shall pay that expert's reasonable fee in responding to the discovery. Thus, court reporter fees and expenses together with fees and expenses of Respondent's experts deposed by Petitioner are paid out of CJA funds, and must be included in the budget. By the same token, court reporter fees and expenses together with fees and expenses of Petitioner's experts deposed by Respondent must be paid by the State of California. In addition, under Rule 6(c) of the § 2254 Rules, for expert witness depositions

noticed by Respondent, the Court may require the State of California to pay the travel expenses, subsistence expenses, and fees of Petitioner's attorney (which the Court will limit to one of Petitioner's attorneys) to attend the deposition. Petitioner's copy of the deposition transcript is paid out of CJA funds, and should be included in the budget.

68. A number of expenses associated with oral testimony at evidentiary hearings also are not part of the budget. The U.S. Marshal pays for fees and travel expenses of fact witnesses called by subpoena to testify at the evidentiary hearing, and for the court reporter's costs for the original and one copy of the evidentiary hearing transcript. *See* 18 U.S.C. § 1825(b); 28 U.S.C. § 753(f). The State of California must pay the court reporter for Respondent's copy of the transcript. The budget should include, however, fees and travel expenses for any expert witness Petitioner intends to call to testify at an evidentiary hearing. Reimbursement of costs for depositions in lieu of live testimony at an evidentiary hearing is usually made according to the same policies as at an evidentiary hearing.
69. In light of the aforementioned provisions, the Court will consider apportionment of discovery costs between Petitioner and Respondent in the budget. The Court also will determine whether any experts who testified at the state court trial should be considered fact witnesses and, if so, order that travel and other expenses be paid by the U.S. Marshal pursuant to 18 U.S.C. § 1825(b), and not included in Petitioner's budget. Because the budget order is a confidential document, the Court will issue a companion order served on both parties indicating any resolutions as to the apportionment of costs.
70. After an evidentiary hearing is conducted, the Court will determine the amount of time and resources needed for post-hearing briefing, and set deadlines accordingly. A separate CMC may be required if the schedule is not established at the culmination of the evidentiary hearing and was not included in the original Phase IV budget application. After review of the

pleadings, briefing, the state record, all properly admitted evidence, and the argument of counsel for the parties, the Court will issue a memorandum order and decision on the merits of the petition.

71. Ordinarily, the Court will address the issuance of a COA at the time of the decision on the merits.⁹ The rationale for this approach is that the Court is most knowledgeable about the issues in the case at the time a decision on the merits is rendered, so it is considered more efficient to examine which issues are appropriate for a COA at that time. There may be cases, however, where it is more prudent to request specific briefing on a COA. Whether counsel are permitted to brief the issue of a COA will be evaluated on a case-by-case basis. In either event, large budget amounts for the preparation of requests for COAs are considered unnecessary.

CONCLUSION

72. This case management guide should serve to assist Petitioner's and Respondent's counsel in managing capital habeas cases while allowing control of associated case costs. Within the basic framework of the budgeting process, creative and individual approaches to case management are encouraged. Ideas for effective case management are welcomed and should be communicated to the Court.

⁹ Only upon extremely rare circumstances will the Court consider entertaining a motion or request for reconsideration. Such motions are not favored.

Appendix A

RATE JUSTIFICATION WORKSHEET

A. Attorney Name and Address: _____

B. Experience and Qualifications:

Admitted to practice: _____ years.

Member of the bar of a federal district court or court of appeals: _____ years.

Primary area of practice: _____

Has previously represented a client in (check all that apply):

- ☐ Direct appeal of a death sentence
- ☐ State capital post-conviction proceeding
- ☐ Direct appeal of a non-capital homicide conviction
- ☐ Capital trial
- ☐ Non-capital homicide trial
- ☐ Other felony trial
- ☐ Non-capital federal habeas corpus
- ☐ Federal capital habeas proceeding

Number of clients previously represented in federal habeas actions: _____

Most recently authorized hourly rate in such a case: _____

Approximate hours spent in training programs on death penalty litigation and/or post-conviction representation: _____

C. Other Relevant Information:

Appendix B

CONFIDENTIAL CASE EVALUATION FORM

The answers on this form are for case management and budgeting purposes only and will not be binding in any respect on substantive issues to be raised in the course of litigation.

NAME OF ATTORNEY(S):

Lead Counsel:

Co-Counsel:

STATE LEVEL PROCEEDINGS

1. Did either lawyer participate in any part of Petitioner's state proceedings?

☐ No -- proceed to question 2. ☐ Yes (indicate which lawyer) _____

If yes, in what aspects of the case?

2. Was a state habeas petition involving the same conviction and sentence filed?

☐ No ☐ Yes

If yes: Date filed: _____ Disposition & Date: _____

3. Was investigation performed at the state level?

☐ Yes ☐ No

If yes, what was the purpose?

4. Were funds requested at the state level for post-conviction investigation?

☐ No - Reason:

☐ Yes

<u>Purpose</u>	<u>Amount Requested</u>	<u>Amount Authorized</u>
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5. Was discovery requested at the state level?

☐ No - Reason:

☐ Yes

<u>Nature of Discovery Requested</u>	<u>Was it: Granted? Denied?</u>
--------------------------------------	-------------------------------------

6. Was an evidentiary hearing held at the state level?

☐ Yes

☐ No

STATUTE OF LIMITATIONS

Based on current information, what is the date required
by the statute of limitations for filing of the petition? _____

THE RECORD

1. Has the record been assembled?

☐ Yes ☐ No: Missing portion(s) and location? _____

2. Have the complete files of prior counsel been obtained?

☐ Yes ☐ No: Missing portion(s) and location? _____

3. As accurately as possible (recognizing that it may be an estimate at this point), provide information about the size of the record:

<u>Type of Record</u>	<u>No. of Pages</u>
Trial transcript & Exhibits	_____
State appellate record	_____
State habeas record & Exhibits (including transcript from any state evidentiary hearing)	_____
Ancillary files and records (including prior counsel's files, investigative reports, etc.)	_____
Total Pages	=====

Counsel for Petitioner: Divide Total Pages by 60 and enter in time required to review the record on the "Phase I Case Management Plan and Budget Form".

FACTORS AFFECTING CASE COMPLEXITY

Check all the factors applicable to this case and provide information that will allow determination of whether the case may be especially complex or costly:

☐ Age of Petitioner at time of offense: _____

☐ Co-defendants (specify if tried jointly or separately).

Number: _____

☐ Number of victims: _____

☐ Related cases.

Summarize:

☐ Prior convictions.

Number and type:

☐ Elapsed time since offense: _____

☐ Elapsed time since trial: _____

☐ Informant involved

Number, type and availability of informant(s):

☐ Serial homicides

Number of different events at separate locations:

☐ Number of death eligibility circumstances alleged: _____
List:

☐ Other crimes charged
List:

☐ Unadjudicated criminal conduct
Type:

☐ Unadjudicated bad acts
Type and Petitioner's age at commission:

☐ Petitioner spent an extended time out of the state or country
Location:

☐ Petitioner's family presently out of the state or country
Location:

☐ Witnesses or other investigation that will require travel
Provide specifics, including number of witnesses, locations, and number of trips anticipated:

☐ Petitioner's and/or family's background records were not obtained in state proceedings.

- ☐ There are issues as to competency/mental illness/or other disabilities.

Explain impact on legal issues:

Explain impact on client relations:

- ☐ Use of drugs or alcohol at time of offense.
- ☐ Petitioner suffered physical/mental abuse as a child.
- ☐ Translator required for petitioner.
- ☐ Translator required for witnesses.

Number of witness and types:

- ☐ Scientific procedures will be required.

Type:

- ☐ No investigation was performed or was denied at the state level.
- ☐ No evidentiary hearing was conducted at the state level.
- ☐ Other issues - Describe: